Malayan Banking Bhd v Neway Development Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-19–05 OF 2013 (S)
ZULKEFLI PCA, AHMAD MAAROP CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH AND BALIA YUSOF FCJJ
2 AUGUST 2017

Contract — Illegality — Dealing in native land — Bank gave term loan to non-native of Sabah to buy native land owned by a native — Such purchase of land or interest therein expressly prohibited by Sabah Land Ordinance ('the SLO') — Bank and borrower knowingly circumvented prohibition by using employee of borrower who native of Sabah to be the nominal buyer of land and then hold it on trust for borrower pursuant to trust deed — Native nominee executed power of attorney giving borrower absolute power to deal with land in any manner it wished — Borrower absolutely assigned term loan to third party who defaulted under loan — Whether court action by bank to recover amount outstanding under loan could not be entertained — Whether entire loan transaction and all instruments and documents connected with it void, illegal and unenforceable for illegality and contravention of public policy — Whether land office deceived into registering transfer of land into native nominee's name and charge on land in bank's name when real owner/buyer was borrower — Contracts Act 1950 s 24(a), (b) & (e) — Sabah Land Ordinance ss 4, 17(1), 64(1) & (2)

Land Law — Sale of land — Illegality — Native of Sabah ('native nominee') acted as nominal buyer of native land and then held it on trust for and on behalf of non-native party pursuant to trust deed — Land in reality bought by non-native who obtained loan for that purpose from bank which had full knowledge of deceptive nature of transaction — Native nominee executed power of attorney giving non-native party absolute power to deal with land in any manner it wished — Whether trust deed fell under definition of 'dealing' in s 4 of Sabah Land Ordinance ('the SLO') — Whether power of attorney given by native nominee null and void under s 64(2) of the SLO — Whether s 64(1) of SLO prohibited bank or non-native borrower from acquiring any interest in land whether by way of charge or otherwise — Whether entire loan transaction and all instruments and documents connected therewith void, illegal and unenforceable for illegality and contravention of public policy — Contracts Act 1950 s 24(a), (b) & (e)

The appellant granted the fourth respondent ('R4'), a non-native of Sabah, a RM2.8m term loan to finance R4's purchase of a piece of native land ('the land') in Sabah from its native owner. Since the Sabah Land Ordinance ('the

A SLO') forbade all dealings in land between non-natives and natives (except with the written permission of the Minister) including the purchase or acquisition by a non-native of any native-owned land or interest in such land, the parties circumvented the prohibition by getting an employee of R4 who was a native of Sabah ('the native nominee') to be the nominal buyer of the B land. The land was eventually transferred into the native nominee's name and a charge over the land was registered in favour of the appellant to secure the term loan. Pursuant to a trust deed, the native nominee held the land on trust for R4 and also executed a power of attorney ('PA') giving absolute power to R4 to sell, dispose of, charge or in any way deal with the land. With the appellant's C knowledge and consent, R4, by a deed of assignment, absolutely assigned the term loan to the first respondent ('R1'). R4 and the second and third respondents (both of whom were directors of R1) then stood as guarantors for the repayment of the term loan. On R1's default, the appellant sued all the D respondents to recover monies owing under the term loan. The High Court dismissed the claim on the ground the term loan was given for an illegal purpose ie, for the purchase by a non-native of native land in contravention of ss 17(1) and 64(1) of the SLO and, hence, the loan agreement was unlawful and unenforceable. The court held that since the entire transaction was tainted E with illegality, all instruments and documents connected with it such as the sale and purchase agreement, deed of assignment and letters of guarantee were all invalid or null and void pursuant to ss 2(g) and 24 of the Contracts Act 1950 ('the Act'). The Court of Appeal ('the COA') agreed with the findings of the High Court and dismissed the appellant's appeal. The Federal Court granted F the appellant leave to appeal against the COA's decision on the question ('the leave question'): 'Whether a deed of trust is a 'dealing' within the meaning of s 4 of the SLO and therefore is illegal under ss 17(1) and 64(1) of the SLO where the subject matter is a native title'. At the appeal, the appellant argued that the SLO was not infringed in any way because no transfer of the land from a native G owner to a non-native party took place and that even though the trust deed could create an equitable interest in the land in favour of the beneficiary under the trust, it was not an interest that was capable of being registered under the SLO. The appellant relied upon the High Court's decision in *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261 H ('Borneo Housing Mortgage Finance Bhd'), to submit that the trust deed was not a 'dealing' under the SLO. The respondents submitted, inter alia, that the COA was right to hold the trust deed as a 'dealing' under the SLO because s 4 of the Ordinance defined 'dealing' as 'any transaction of whatever nature by which land is affected under this Ordinance'.

I **Held,** answering the leave question in the affirmative and dismissing the appeal:

(1) The purchase of the native land through the native nominee was obviously done to circumvent a clear statutory prohibition. As such the

purchase was clearly illegal as correctly found by the courts below. It was not disputed that R4 was the actual buyer of the native land through the native nominee. Such fact was confirmed by the execution of successive powers of attorney, an instrument prohibited by s 64(2) of the SLO. In the power of attorney, the native nominee purportedly gave absolute powers to R4 to deal with the native land. Obviously, R4 must have been very well aware of the statutory prohibition. As such the purchase of the native land itself was illegal ab initio. Section 24(a) and (b) of the Act were clear. Any subsequent instrument and documentation that was linked to or arose out of the purchase was tainted with the illegality including the third-party first legal charge that secured the term loan (see para 22).

(2) A deception was practised on the relevant land office, a part and parcel of the public administration in this country, in registering the native land under the name of the native nominee when, in truth, the real owner/buyer was R4 and thereafter registering the charge in favour of the appellant. The appellant could not say that it was a bona fide lender without any knowledge on the purpose of the term loan. It knew the purpose of the term loan and knew well that it was R4 who was the actual owner/buyer of the native land using the native nominee in order to circumvent the prohibition in s 17(1) of the SLO. The appellant came to court with unclean hands. The deception that was practised was contrary to public policy. The registrations were therefore illegal and invalid (see s 24(e) of the Act) (see para 23).

(3) This court wholly disagreed with the appellant's contention that the law affecting native land in Sabah was as propounded in the case of *Borneo Housing Mortgage Finance Bhd*. That case was wrongly decided and it was hereby overruled (see para 32).

[Bahasa Malaysia summary

Perayu memberikan responden keempat ('R4'), bukan anak negeri Sabah, RM2.8 juta pinjaman berjangka untuk membiayai pembelian tanah anak negeri ('tanah tersebut') di Sabah daripada pemilik anak negeri. Memandangkan Ordinan Tanah Sabah ('OTS') tidak membenarkan semua urusan tanah di antara bukan anak negeri dan anak negeri (kecuali dengan kebenaran bertulis oleh Menteri) termasuk pembelian atau pengambilan tanah milik anak negeri atau kepentingan di dalam tanah sedemikian oleh bukan anak negeri, pihak-pihak menghalang larangan tersebut dengan mendapatkan pekerja R4 yang mana adalah anak negeri Sabah ('penama anak negeri') untuk menjadi pembeli nominal tanah tersebut. Tanah tersebut akhirnya dipindah ke atas nama penama anak negeri dan caj ke atas tanah didaftarkan bagi pihak perayu untuk menjamin pinjaman berjangka. Berikutan surat ikatan amanah, penama anak negeri memegang tanah tersebut atas amanah bagi R4 dan juga melaksanakan surat kuasa wakil ('SKW') memberi kuasa mutlak kepada R4

untuk menjual, melepaskan, caj atau dalam apa-apa cara urusan dengan tanah tersebut. Dengan pengetahuan dan izin perayu, R4, melalui surat ikatan penyerahhakkan, menyerahkan secara mutlak pinjaman berjangka tersebut kepada responden pertama ('R1'). R4 dan responden kedua dan ketiga (kedua-duanya adalah pengarah R1) kemudiannya bertindak sebagai penjamin bagi bayaran balik pinjaman berjangka tersebut. Atas keingkaran R1, perayu menyaman kesemua responden untuk mendapatkan semula wang yang dipinjam di bawah pinjaman berjangka tersebut. Mahkamah Tinggi menolak tuntutan atas alasan pinjaman berjangka tersebut diberikan bagi tujuan salah di sisi undang-undang iaitu bagi bayaran oleh bukan anak negeri tanah negeri tersebut bertentangan ss 17(1) dan 64(1) OTS dan, maka perjanjian pinjaman tersebut adalah tak sah dan tidak boleh dikuatkuasakan. Mahkamah memutuskan bahawa memandangkan transaksi keseluruhan dicemar dengan ketaksahan, kesemua intrumen dan dokumen yang berkaitan dengannya seperti perjanjian jual beli, surat ikatan penyerahhakan dan surat-surat jaminan kesemuanya adalah tak sah atau batal dan tak sah berikutan ss 2(g) dan 24 Akta Kontrak 1950 ('Akta'). Mahkamah Rayuan ('MR') bersetuju dengan dapatan Mahkamah Tinggi dan menolak rayuan perayu. Mahkamah Persekutuan memberikan perayu izin untuk merayu terhadap keputusan MR atas soalan ('soalan izin'): 'Whether a deed of trust is a 'dealing' within the meaning of s 4 of the SLO and therefore is illegal under ss 17(1) and 64(1) of the SLO where the subject matter is a native title'. Semasa rayuan, perayu berhujah bahawa OTS tidak dilanggar dalam apa jua cara kerana tiada pindahan tanah berlaku daripada pemilik anak negeri kepada pihak bukan anak negeri dan walaupun surat ikatan amanah tersebut boleh membentuk kepentingan ekuiti di dalam tanah memihak kepada benefisiari di bawah amanah, ia bukan kepentingan yang dapat didaftarkan di bawah OTS. Perayu bergantung ke atas keputusan Mahkamah Tinggi di dalam kes *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261 ('Borneo Housing Mortgage Finance Bhd'), untuk berhujah bahawa surat ikatan amanah tersebut bukan 'dealing' di bawah OTS. Responden-responden berhujah, antara lain, bahawa MR adalah betul untuk memutuskan surat ikatan amanah sebagai 'dealing' di bawah OTS kerana s 4 OTS mentakrifkan 'dealing' sebagai 'any transaction of whatever nature by which land is affected under this Ordinance'.

Diputuskan, menjawab soalan izin secara afirmatif dan menolak rayuan:

(1) Pembelian tanah anak negeri melalui penama anak negeri jelas dibuat untuk menghalang larangan statutori yang jelas. Dengan itu pembelian tersebut jelas salah dari segi undang-undang seperti yang didapati dengan betul oleh mahkamah bawahan. Ia tidak dipertikaikan bahawa R4 adalah pembeli sebenar tanah anak negeri tersebut melalui penama anak negeri. Fakta sedemikian adalah disahkan oleh pelaksanaan surat kuasa wakil berturutan, instrumen yang dilarang oleh 64(2) OTS. Dalam surat kuasa wakil, penama anak negeri dengan sengaja memberi kuasa mutlak

kepada R4 untuk berurusan dengan tanah anak negeri. Secara jelas, R4 semestinya sangat tahu mengenai larangan statutori. Oleh yang demikian, pembelian tanah anak negeri dengan sendirinya adalah salah dari segi undang-undang ab initio. Seksyen 24(a) dan (b) Akta adalah jelas. Apa-apa instrumen kemudiannya dan dokumen yang berkait atau berbangkit daripada pembelian dicemar dengan ketaksahan termasuk caj undang-undang pertama pihak ketiga yang menjamin pinjaman berjangka tersebut (lihat perenggan 22).

(2) Penipuan dilakukan di pejabat tanah yang relevan, sebahagian daripada pentadbiran awam negara ini, dalam mendaftar tanah anak negeri di bawah nama penama anak negeri tetapi pada hakikatnya, pemilik/pembeli sebenarnya adalah R4 dan kemudiannya mendaftar caj tersebut memihak perayu. Perayu tidak boleh menyatakan bahawa ia adalah peminjam bona fide tanpa apa-apa pengetahuan atas tujuan pinjaman berjangka tersebut. Ia tahu tujuan pinjaman berjangka tersebut dan tahu sangat bahawa ia adalah R4 pemilik/pembeli sebenar tanah anak negeri tersebut menggunakan penama anak negeri untuk menghalang larangan di dalam s 17(1) OTS. Perayu hadir di mahkamah dengan tidak jujur. Penipuan dilakukan adalah bertentangan polisi awam. Pendaftaran oleh itu adalah salah di segi undang-undang dan tak sah (lihat s 24(e) Akta) (lihat perenggan 23).

(3) Mahkamah secara keseluruhannnya tidak bersetuju dengan hujahan perayu bahawa undang-undang menjejaskan tanah anak negeri di Sabah seperti yang dikemukakan di dalam kes *Borneo Housing Mortgage Finance Bhd*. Kes tersebut adalah diputuskan secara salah dan oleh itu ditolak (lihat perenggan 32).]

Notes

For cases on dealing in native land, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5713–5714.

For cases on illegality, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5163–5164.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 261, HC (overd)

Goh Seh Ho v Tanavanus Sdn Bhd & Ors [1992] 2 CLJ 1005, HC (refd)

Hasmah bte Abdul Rahman v Kenny Chua Kien Lam [2006] 5 MLJ 236, CA (refd)

International Bank Malaysia Bhd (formerly known as Hock Hua Bank (Sabah) Bhd) v Lovintih bte Balantai @ Betty [2007] 7 MLJ 97; [2007] 6 CLJ 279, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)

A *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141, CA (refd)
Tan Sri William Cheng Heng Jem & Anor (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen & Ors [2013] 8 MLJ 417, HC (refd)
B *Tinsley v Milligan* [1993] 3 All ER 65; [1994] 1 AC 340, HL (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 ss 2(g), 24, 24(a), (b), (e)
C Sabah Land Ordinance (Cap 68) ss 17(1), 64, 64(1), (2)
Securities Commission Act 1993
National Land Code

D **Appeal from:** Civil Appeal No S-02–336 of 2009 (Court of Appeal, Putrajaya)

Ronny Cham (Brenndon Soh with him) (Ronny Cham & Co) for the appellant.
Baldev Singh (Baldev Gan & Assoc) for the respondents.

E **Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):**

INTRODUCTION

[1] By a vesting order dated 17 August 2004 granted by the High Court of
F Malaya at Kuala Lumpur all rights, powers and interest including all legal proceedings of Maybank Finance Bhd ('MFB') were vested under Malayan Banking Bhd, the appellant herein. Although the earlier financial transactions involved in this case were conducted by MFB, by virtue of the said vesting order the appellant has absorbed all the rights and obligations of MFB
G including the right to claim against the respondents herein. Thus, in this judgment any reference to the appellant in the earlier financial transactions refers to MFB.

[2] On 25 March 2013 this court granted the appellant leave to appeal on
H a sole question which reads:

> Whether a deed of trust is a 'dealing' within the meaning of section 4 of SLO and therefore is illegal under section *(sic)* 17(1) and 64(1) of the SLO where the subject matter is a native title.

I For clarity 'the SLO' refers to the Sabah Land Ordinance Cap 68.

[3] The appellant is dissatisfied with the decisions of the High Court and the Court of Appeal dismissing its claim for the sum of RM2,178,105.28 as at 31 October 2008 against the first respondent in connection with a term loan

totaling RM2.8m ('the term loan') given by the appellant to the fourth respondent on 30 January 1997 'to part finance the purchase' of a native land under native title No 213013480, District of Penampang, Sabah ('the native land') on 29 October 1996 from the original registered native owner Tan Haw Bin.

[4] The second and third respondents were the directors of the first respondent. They signed letters of guarantee dated 30 January 1997 and 8 September 1997 respectively to guarantee the term loan and the bridging loan facility given by the appellant. The second, third and fourth respondents were sued as guarantors for the term loan.

BRIEF BACKGROUND FACTS

[5] As alluded to above, the term loan was originally given by the appellant to the fourth respondent on 30 January 1997 'to part finance the purchase' of the native land initially by the fourth respondent. There were three other pieces of native lands purchased with a further term loan of RM2.2m from the appellant. But these other native lands are not relevant in this appeal. The term loan for their purchases had been duly settled.

[6] As the fourth respondent was not a native by definition in law in Sabah and thus prohibited to buy directly any native land, a native nominee by the name of Chin Nyuk Fong ('the native nominee') was therefore used to hold the native land in her name in trust for and on behalf of the fourth respondent. The native nominee was a staff of the fourth respondent. It was therefore the native nominee who entered into the sale and purchase agreement with the native owner to purchase the native land.

[7] The native nominee also executed a power of attorney dated 8 September 1997 which was subsequently revoked and replaced by another power of attorney dated 8 July 2002 giving absolute power to the fourth respondent to sell, dispose of, charge or in any way deal with the native land.

[8] By a deed of assignment dated 8 September 1997, the term loan was absolutely assigned by the fourth respondent to the first respondent. The fourth respondent in turn stood as the corporate guarantor for the first respondent. The assignment was with the full knowledge and consent of the appellant.

[9] The appellant also granted a bridging loan facility of RM6m (the bridging loan facility) to finance the development project of the fourth respondent on the native land and the other native lands purchased. However,

the facility was not utilised as the project was abandoned. The appellant therefore subsequently cancelled the facility.

[10] As the first respondent failed to settle the term loan and other financial facilities obtained from the appellant, steps were therefore taken to dispose of the native lands including the native land that were originally given as third party first legal charge securities to the appellant. The total sum obtained from the sales was only RM5.2m. It was not sufficient to settle all the debts of the first respondent with the appellant leaving a partial outstanding balance of the term loan in the sum of RM1,715,956.32 as at 31 May 2006 with interest accruing.

[11] As at 31 October 2008, the sum outstanding balance of the term loan was RM2,178,105.28. The first respondent failed to settle the outstanding sum upon demand made by the appellant. A claim was thus filed against all the respondents for the outstanding sum due. However, it should be noted that the second and third respondents denied that there were any demand made on the sum claimed. Instead, a demand was made for a lower sum. However, this demand issue is not within the scope of the question posed. As such we need not deal with it in this judgment.

FINDINGS OF THE COURTS BELOW

[12] The primary reason given by the High Court in dismissing the claim was that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of ss 17(1) and 64(1) of the SLO. It was held that s 17(1) of the SLO clearly prohibits any dealing between a native and a non-native in respect of a native land. As such, it was ruled that since the transaction was tainted with illegality the whole sale and purchase agreement was void by virtue of s 24(a) and (b) of the Contracts Act 1950. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality.

[13] The Court of Appeal agreed with the findings of the High Court and dismissed the appeal by the appellant.

BEFORE THIS COURT

Contentions of the parties

[14] The thrust of the contention of learned counsel for the appellant was that there was never a transfer of the native land from a native owner to a non-native. As such ss 17(1) and 64 of the SLO were never infringed. While

there was a trust deed and capable of creating interest in the native land it was incapable of registration under the SLO. It was not 'dealing' as defined in the SLO. Thus, it was outside the ambit of any of the provisions of the SLO.

[15] Learned counsel went on to submit that the guiding case law then that was relied upon in the practice of land law in Sabah in respect of native land was the case of *Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261 (HC). It was held in that case that a trust deed could not be considered as dealing as defined under the SLO. Thus, it was submitted that there was no prohibition for a beneficiary of such trust deed to acquire equitable interest in a native land. The interest in such native land created by a trust deed would be between the trustee and the beneficiary. And it was thus pleaded before us that in view of the understanding of the law then prevailing, that is, as per the decision in *Borneo Housing Mortgage Finance Bhd* many such trust deeds were created on native lands. As such, to uphold the judgments of the courts below in this case would result in severe losses for many parties. Reference was also made to the case of *Tan Sri William Cheng Heng Jem & Anor (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen & Ors* [2013] 8 MLJ 417.

[16] In response, learned counsel for the respondents supported the judgments of the courts below and prayed that this appeal should be dismissed with costs. He submitted that the 'sole and unqualified purpose or object of the said Term Loan was to enable' the fourth respondent and not the native nominee to purchase the native land. The purchase of the native land by the native nominee as the trustee of the fourth respondent 'using monies provided by the said Term Loan was clearly and obviously a 'dealing' in' the native land by the fourth respondent because the Native Land was 'affected by the said transaction'.

[17] Learned counsel also contended that the '... 'object' or purpose of the said Term Loan was of such a nature that, if permitted, would defeat the provision of Section 17(1)' of the SLO by allowing the fourth respondent to 'deal' with the native land. It would also defeat s 64(1) of the SLO by allowing the fourth respondent 'to acquire an interest' in the native land.

[18] Learned counsel then went on to submit that 'the Term Loan Facility was unlawful (ie illegal), unenforceable and void by virtue of ss 24 and 2(g) of the Contracts Act 1950'.

[19] On the issue of illegal agreement, learned counsel said that 'the law pertaining to an illegal agreement where the parties are both equally blame-worth (ie in pari-delicto) is clear'. In the present case, both the appellant

and the fourth respondent were 'in pari-delicto in entering into the said Term Loan which had its sole purpose' of enabling a non-native to acquire an interest in the native land. And since the term loan 'is clearly an unlawful or illegal agreement and cannot be enforced', the deed of assignment dated 8 September 1997 is also tainted with illegality.

[20] In respect of the letters of guarantee of the second and third respondent, learned counsel said that they 'are tainted with illegality and are unenforceable and void'. Similarly, the corporate guarantee of the fourth respondent 'is also tainted with illegality and unenforceable and void'. Those documents were intended 'to secure repayment of monies for an illegal agreement (ie the Term Loan Facility) are themselves made for an unlawful purpose pursuant to section 24(a) and/or (b) of the Contracts Act 1950'.

DECISION OF THIS COURT

[21] For convenience, we reproduce the relevant provisions of the SLO and Contracts Act 1950.

SLO:

Section 4:

> 'dealing' means any transaction of whatever nature by which land is affected under this Ordinance;

Section 17:

> Land dealings with natives.
>
> Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

Section 64(1) and (2):

> (1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.
>
> (2) Notwithstanding the provisions of any written law, any power of attorney whereof the donee or any donee is a non-native, if it relates to any land held under this Part, shall be null and void.

Contacts Act 1950:

Section 24:

> The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[22] At the outset we would think that the leave question is academic and misconceived in relation to this appeal. Our reason is this. It simply ignored the first stage of the transaction, namely, the purchase of the native land itself through the native nominee. It was obviously done in order to circumvent a clear statutory prohibition. As such the purchase was clearly illegal as correctly found by the courts below. It was not disputed that it was the fourth respondent who was the actual purchaser of the native land through the native nominee. Such fact was confirmed by the execution of successive power of attorney, an instrument prohibited by s 64(2) of the SLO. In the power of attorney dated 8 July 2002, the native nominee purportedly gave absolute powers to the fourth respondent to deal with the native land. Obviously the fourth respondent must have been very well aware of the statutory prohibition. As such the purchase the native land itself was illegal ab initio. Section 24(a) and (b) of the Contracts Act 1950 is clear. In our view no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality.

[23] There was also a deception practiced on the relevant land office, a part and parcel of the public administration in this country, in registering the native land under the name of the native nominee when in truth the real owner/buyer was the fourth respondent and thereafter registering the charge in favour of the appellant. And the appellant could not be heard to say that it was a bona fide lender without any knowledge on the purpose of the term loan. It knew the purpose of the term loan and knew well that it was the fourth respondent who was the actual owner/purchaser of the native land using the native nominee in order to circumvent the prohibition of s 17(1) of the SLO. Indeed, the appellant came to court with unclean hands. In our view therefore such a deception is contrary to public policy. The registration is therefore illegal and invalid (see: s 24(e) of the Contracts Act 1950).

[24] In *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 at p 640 this court said this:

> It should also be said that public policy is not static. 'The question of whether a particular agreement is contrary to public policy is a question of law ... It has been indicated that new heads of public policy will not be invented by the courts for the following reasons ... However, the application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise ... The rule remains, but its application varies with the principles which for the time being guide public opinion' (*Halsbury's Law of England*, (5th Ed Vol 22) at para 430).

[25] And in *Hasmah bte Abdul Rahman v Kenny Chua Kien Lam* [2006] 5 MLJ 236 the core of the dispute was on the purported purchase by the appellant of 170,000 shares in a company called SBBS which was formerly known as Sykt Binaan Budi Sawmill Bhd, a company involved in logging business. The thrust of the claim by the respondent was that he was the wholly beneficial owner of the shares in SBBS. The appellant was merely a trustee of the shares held by her in SBBS since she did not pay for them. The respondent utilised the appellant in order to float SBBS on the Second Board of the then Kuala Lumpur Stock Exchange ('KLSE'). To succeed in the float, the respondent was required to comply with several requirements by the Securities Commission ('SC'), the KLSE and the relevant provisions of the Companies Act 1965 and the Securities Commission Act 1993. The respondent gave the impression to the relevant authorities by way of statutory declarations that all the requirements were complied with including the purported 30% Bumiputra equity participation in Malaysian incorporated companies in line with the spirit and objectives of the Malaysian Government's policy. SBBS was therefore successfully listed in the Second Board on or around 7 July 1997.

[26] In allowing the appeal by the appellant in that case, the Court of Appeal said this in respect of the purchase of the shares of SBBS at paras 27–28 of the judgment:

> Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end'. There was indeed a deception practiced on the relevant approving bodies which were part and parcel of the public administration in this country. Indeed, the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.
>
> ... the question of the role played by the appellant in the impugned transaction would be quite irrelevant ... In any event the consequential that usually follows in any declared illegal transaction is commonly denoted by the maxim 'the loss lies where it falls'. Thus, in this case it is inevitable but to say: 'let the transacted shares and the rights and bonus issues shares lie where they fall'.

[27] Further, in the present case the appellant in pleading its claim against the first respondent relied, inter alia, on the breach by the first respondent of the terms and conditions in the third party first legal charge over the native land given as a security for the term loan. This is obvious in paras 7 and 10 of the statement of claim as amended. The appellant could not therefore be heard to say that its claim was independent of the transaction found tainted with illegality (see: *Tinsley v Milligan* [1993] 3 All ER 65; [1994] 1 AC 340 (HL); *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141).

[28] Hence, even assuming that the question posed is answered in the negative it will not alter the ultimate outcome of this appeal. For the above reason alone that this appeal should be dismissed.

THE TRUST INSTRUMENT AND DEALING

[29] Now on the term 'dealing' as defined in the SLO in relation to a trust deed, the Court of Appeal in dismissing the claim of the appellant said this:

> ... the wordings of s 17(1) of the Ordinance impose a bar on any dealings involving a non native on one part and a native on the other. The object or purpose of the term loan was such a nature that if permitted it would defeat the provisions of ss 17(1) and 64(1) of the Ordinance. Under that scheme of provision it is patently clear to us that the term loan agreement made between the plaintiff and the fourth defendant to facilitate the purchase of the native land was made in contravention of s 17(1) of the Ordinance. As a result, the agreement is tainted with illegality and forbidden by law. In totality, the agreement becomes unlawful and unenforceable (see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* (1998) 3 MLJ 151; *St John Shipping Cory Joseph Rank Ltd* (1957) 1 QB 267 and *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). Quite apart from this, the whole agreement also becomes a void agreement within the meaning of s 24 and s 2(g) of the Contracts Act 1950. Since the whole transaction is tainted with illegality, consequently all the other connected instruments such as the deed of assignments, letters of guarantee executed pursuant to the agreement are also tainted with illegality. (See *Spencer v Agenda* [1971] 3 All ER 417).
>
> ...
>
> ... it is evident that through the instrument of a trust deed Chin purported to hold the native land in trust for the fourth defendant to enable the fourth defendant to purchase the native land though a non-native. To us, this constitutes 'dealing' within the definition of s 4 of the Ordinance. As such, we cannot accede to the plaintiff's arguments as this will mean that creation of a trust deed to circumvent the provisions of s 17(1) of the Ordinance is valid.
>
> This cannot be the intention of the legislators. Clearly, s 17(1) of the Ordinance prohibits any kind of dealings and this will include any trust deed created to circumvent the Ordinance. In this regard, we would like to refer to the case of *OCBC Bank (Malaysia) Bhd vs Master Arc Sdn Bhd & 8 others* (unreported) (Civil Suit No K 22–173 of 2000), wherein Justice Ian Chin J remarked the following:

> The Land Ordinance has a wider encompass in its definition where it defined the term in the following words '… any transaction of whatever nature by which land is affected under this ordinance …'. Clearly then an attempt by a trust deed would be one of the nature of dealing which s 17 of the Sabah Land Ordinance seeks to strike down.

> We accept the forgoing passage by the learned judge as a correct statement of law. In the premises, we affirm the proposition that the use of nominees (be it in the name of a trust) to circumvent the prohibition of dealings in the native lands between a non native and a native is illegal and contravenes ss 17(1) and 64(1) of the Ordinance.

[30] We wholly endorse the approach and reasons given by the Court of Appeal and affirm the principles of law enunciated thereof.

[31] We do not think the reference to the view of Judith E Sihombing in her book *The National Land Code (1981)* in Ch 14 pp 333–334 can assist the argument of learned counsel for the appellant. The learned author expressed her view on the term 'dealing' in respect of the National Land Code. She opined thus:

> The term 'dealing' refers to *a transaction in land entered into in accordance with the provisions of the code* which, when completed and an instrument in statutory form is registered, gives rise to a substantive entry on the register appropriate to the transaction. (Emphasis added.)

It should be noted that even the learned author predicated her statement with the phrase 'a transaction in land entered into in accordance with the provisions of the code'. Obviously the initial transaction must be valid to begin with. In the present case we find otherwise. Further, we agree that the term 'dealing' in the SLO is of wider scope as indicated by the courts below. Hence and with respect the view of the learned author is quite irrelevant in this case.

[32] In respect of the contention that the law affecting native land in Sabah should be as propounded in the case of *Borneo Housing Mortgage Finance Bhd*, we wholly disagree. We are of the view that that case was wrongly decided and we hereby overrule it. In fact in a subsequent case of *Goh Seh Ho v Tanavanus Sdn Bhd & Ors* [1992] 2 CLJ 1005 the same judge addressed the meaning of 'dealing' in the SLO and he said this:

> … The subject matter, that is quarrying for stones, is not a 'dealing' within the meaning of s 17(1) of the Sabah Land Ordinance. The 'quarrying of land' does not require to be registered. 'Dealing' as defined in s 4 means any transaction or instrument capable of registration within the Ordinance. It would have been otherwise if the agreement had been one of sale and purchase.

In another case of *International Bank Malaysia Bhd (formerly known as Hock Hua Bank (Sabah) Bhd) v Lovintih bte Balantai @ Betty* [2007] 7 MLJ 97;

[2007] 6 CLJ 279 that involved a native land and a native nominee arranged by a true non-native purchaser to secure a bank loan, the Court of Appeal in dismissing the appeal by the bank said this, inter alia:

> ... The appellant is a local bank in the State Sabah. They must have knowledge of the restrictions in dealings over land held under native title pursuant to the land laws of Sabah. They cannot come to court and claim that the title to the said land is a clean title and maintain that they are a bona fide party for value without notice upon registration of a land dealing and indirectly ignoring the law relating to native lands in Sabah.

[33] Accordingly, for the above reasons our answer to the question posed is in the affirmative. We therefore dismiss this appeal with costs.

The leave question answered in the affirmative and the appeal dismissed.

Reported by Ashok Kumar